No. 80-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated,
Appellants,

v.

OTIS BOWEN, Governor; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner; THEODORE SENDAK, Attorney General; Their Agents, Assigns, Successors, Representatives, Those acting in concert with them, and all others similarly situated,
Appellees.

On Appeal from the United States District Court for the Northern District of Indiana

MOTION TO AFFIRM

LINLEY E. PEARSON
Attorney General,
State of Indiana

MICHAEL SCHAEFER
Deputy Attorney General,
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6210

Counsel for Appellees.

Central Publishing Company, Inc., Indianapolis, IN 46206

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Motion to Affirm	2
Reasons for Affirmance	2
Conclusion	6

TABLE OF AUTHORITIES

CASES: Page

Baird v. Mass. Dept. of Public Health, 599 F.2d 1098 (1st Cir. 1979) 4

Colautti v. Franklin, 439 U.S. 379 (1979)..... 4

Connecticut v. Menillo, 423 U.S. 9 (1975) 4

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 4

Maher v. Roe, 432 U.S. 464 (1977)..... 3

Roe v. Wade, 410 U.S. 113 (1973) 2, 3

Roemer v. Bd. Of Public Works of Maryland, 426 U.S. 736 (1976) 5

United States v. Oregon State Medical Society, 343 U.S. 326 (1952) 5

OTHER:

Rule 52(a), Federal Rules of Civil Procedure 5

No. 80-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated,

Appellants,

v.

OTIS BOWEN, Governor; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner; THEODORE SENDAK, Attorney General; Their Agents, Assigns, Successors, Representatives, Those acting in concert with them, and all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Indiana

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States District Court for the Northern District of Indiana be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

Reasons Why the District Court Should be Affirmed

Introduction

This appeal presents a constitutional question conclusively decided in the landmark case of *Roe* v. *Wade*, 410 U.S. 113 (1973). The Plaintiffs have, from time to time, challenged an Indiana statutory requirement for second trimester hospital abortion and the District Court has, each time, found that Indiana's second trimester hospitalization requirement is constitutional.

The Questions Are Not Substantial

1. *The District Court correctly followed this Court's decision in* Roe v. Wade *which explicitly permits states to require hospitalization for second trimester abortions.*

The District Court relied on the following express language of this Court in *Roe* v. *Wade*:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.

> *Examples of permissible state regulations in this area are requirements* as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; *as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status*; as to the licensing of the facility; and the like. *Ibid.*, 410 U.S. 113, at 163. (Emphasis added by District Court).

The emphasized language means what its plain meaning indicates: the term "whether" means a state *may* decide *if* a hospital is the appropriate facility for a second trimester abortion.

The Plaintiffs' theory disregards this clear directive from the Supreme Court despite warnings from the Court that it will not retreat from its holding in *Roe*. For example, in *Maher* v. *Roe*, 432 U.S. 464, (1977), this Court cautioned,

> Our conclusion signals no retreat from *Roe* or the cases applying it. *Ibid.*, 432 U.S. at 475.

The net result of Plaintiffs' theory would be to totally abandon the *Roe* v. *Wade* trimester anaylsis as the test to mediate the individual's constitutional right of privacy and the state's interest in protecting and promoting maternal health. The District Court's unanimous opinion (App. A, at 10a) perceptively noted that Plaintiffs' position, as supported by but two, single judge District Courts, substitutes a new test for the long-standing trimester anaylsis of this Court, namely, whether the particular abortion is more dangerous than childbirth. However, to retreat from the *Roe* trimester analysis will inevitably lead to a total surrender of the state's interest into the judgment of the individual physician. To accept Plaintiffs' attempted inroads on *Roe* v. *Wade*, not only will upset long-standing reliance on *Roe's* clear directive, but it will add impetus to a creeping anti-nomianism whose logical conclusion and objective is no regulation at all, anywhere—anytime, whether it be generally applicable surgical standards,

contra, Baird v. *Mass Dept. of Public Health*, 599 F.2d 1098, (1st Cir. 1979), or even the medical qualification of the practioner, *contra, Connecticut v. Menillo*, 423 U.S. 9 (1975). At such end point, a subjective test replaces the objective test and the state would be unable to assert its rightful interest in maternal health without offending the due process—notice considerations found to be present by this Court in *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

2. *The Plaintiffs failed to demonstrate a likelihood of success on the merits to justify a preliminary injunction.*

The requirements which petitions for preliminary injunctions must meet are irreparable injury and likelihood of success on the merits. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975).

In addition to the theoretical defect in Plaintiffs' legal theory, the District Court further found that Plaintiffs' theory, even if accurate, lacked sufficient evidence to support it. The District Court ruled:

> There was presented no evidence sufficient to convince this Court that birth is more dangerous than early second trimester D & E abortions. (*Ibid.*, App. A, at 17a).

This finding was supported, in part, by a comparison of the United States' D & E mortality rate of 7.6/100,000 for the thirteenth to fifteenth week or 13.2/100,000 for the sixteenth to twentieth with the lower Indiana maternal death rate of 7.0/100,000 in 1977 or 10.8/100,000 in 1978. These statistics show that childbirth is less dangerous than a second trimester D & E abortion. (*Ibid.*, App. A at 17a). The District Court further found that one Plaintiff, Dr. Lewis, deserved very little credibility. (*Ibid.*, App. A at 17a). The District Court further found that hospitals are available, specifically including Gary Methodist hospitals. (District Court Opinion, App. A. at 7a; *see also* Defendants' Exhibit A, App. M at 88a). In light of the above evidence and findings, appellant severely understates the failure of

proof in the District Court when *he* faults that Court for relying on "facially imprecise evidence." (Appellant's Jurisdictional Statement, at 26). It is not the place of the Supreme Court of the United States, or any appellate court, to reappraise evidence or determine the credibility of witnesses. *Roemer* v. *Bd. of Public Works of Maryland*, 426 U.S. 736, 758 (1976); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952); *see*, Rule 52(a), Fed. R. Civ. Pro.

3. *The question whether the District Court correctly treated Plaintiffs' supplemental petition as a modification of final judgment preserves no reversible error.*

This is an action that was commenced on November 13, 1974, attacking Indiana's Abortion Statute. (App. E at 31a). In addition to striking down and permanently enjoining the statute's provisions for parental consent, the District Court also ruled on Plaintiffs' attack on this same second trimester hospitalization requirement:

> Whether a hospital requirement for the second trimester per se comports with a "reasonable regulation" standard is not certain and need not be decided at this point. But at the very least in instances where a preliminary injunction is sought and the plaintiff bears the burden of showing a likelihood of ultimately prevailing, the foregoing language of the Court is sufficient grounds for denying the requested preliminary relief. *Ibid.*, App. E at 35a.

The defendants appealed the permanent injunction; the Supreme Court affirmed. 429 U.S. 1067. The Plaintiffs did not cross-appeal the second trimester holding. The District Court granted permanent relief on September 14, 1976. As this injunction was elevated from the status of preliminary injunction to a permanent injunction, its silence on the hospitalization requirement, found earlier to be constitutional, does not deprive it of its "finality." The Plaintiffs non-action over the following four years was ended only by the institution of criminal proceedings. (*See*,

District Court Memorandum, App. A at 3a). (Plaintiffs' assertion that other factors motivated the filing of their "supplemental petition" is entirely self-serving; *see*, Appellants' Jurisdictional Statement, at 6-7.) By whatever color appellants called their pleading designed to enjoin the criminal prosecution of Dr. Lewis, the District Court reached the issue on their likelihood of prevailing on the merits. The District Court had previously and unanimously found the challenged statute constitutional; it simply did so again on September 12, 1980.

CONCLUSION

Appellees respectfully pray that the Supreme Court affirm the September 12, 1980 order of the unanimous United States District Court for the Northern District of Indiana.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ Michael Schaefer
Michael Schaefer
Deputy Attorney General

Counsel for Appellees

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6210
February, 1981.